

E-COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

Supreme Court, U.
FILE

SEP 16 19

MICHAEL RODAK, JR.

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,
Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLER and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of
all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSER and MARVIN D. CRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS
DAVID N. DINKINS AND GUMERSINDO MARTINEZ

DAVID N. DINKINS

President of the Board of Elections
of the City of New York
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GUMERSINDO MARTINEZ

Commissioner of Elections
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80 Varick Street
New York, New York

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR RESPONDENTS

DAVID N. DINKINS AND GUMERSINDO MARTINEZ

Section 186 of New York's Election Law Unconstitutionally Impedes Previously Unaffiliated Voters From Affiliating With the Political Party of Their Choice and Participating in Its Primary Election

Respondent, David N. Dinkins, is the duly appointed President of the Board of Elections of the City of New York. Respondent, Gumersindo Martinez, is a duly appointed member of the Board of Elections of the City of New York. This brief is submitted in respondents' respective personal capacities, since the four members of the New York City Board of Elections were equally divided over the authorization of the instant brief.*

Section 186 has the effect of disenfranchising large numbers of New York City residents each year. Thousands of bona fide young voters were excluded from the primary elections held in New York on June 20, 1972 pursuant to Section 186, simply because they failed to enroll in the political party of their choice prior to October 2, 1971. Respondents, charged with the responsibility to oversee the electoral process in New York City, perceive no compelling state interest which is advanced by applying Section 186 to disenfranchise new voters affiliating with a political party for the first time. We see no basis for fearing that new voters affiliating with a political party for the first time present a danger of bad faith raiding. Accordingly, apply-

* At the time the *Rosario* case was commenced, the New York City Board of Elections was comprised of Maurice O'Rourke, James M. Power, Thomas Mallee and J. J. Duberstein. The Board is currently made up of David N. Dinkins, Gumersindo Martinez, William Larkin and J. J. Duberstein. The Board is charged with the responsibility of administering the electoral process in the City of New York.

ing the test mandated by this Court in *Dunn v. Blumstein*, — U.S. —, 31 L. Ed. 2d 274 (1972), respondents join with petitioners in requesting that Section 186 be declared unconstitutionally overbroad.

Moreover, we believe that the summary disenrollment procedures provided by Section 332 of the Election Law coupled with New York's comprehensive criminal sanctions governing election fraud provide adequate safeguards against bad faith raiding. Accordingly, we believe that persons wishing to alter a pre-existing political affiliation should be permitted to do so free from the strictures of Section 186 of the Election Law, since less drastic alternatives exist by which New York could guard against bad faith raiding.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed and Section 186 should be declared unconstitutionally overbroad.

Respectfully submitted,

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